

Spectre Corporation v. USA

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1 P R O C E E D I N G S

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3 (Proceedings called to order, 2:25 p.m.)

4 THE COURT: I apologize for the delay this
5 afternoon, but we are here now in Spectre Corporation vs.
6 the United States, and we're here on the Government's
7 motion to dismiss the case. Why don't we talk about the
8 main motion and then we'll look at the issue of the sur-
9 reply.

10 And for the Government, let me ask you to
11 introduce yourself first?

12 MS. ROSE: Good afternoon, Your Honor. My name
13 is Shari Rose, representing the United States in this
14 matter from the Department of Justice. With me here at
15 the table is Andrew Hunter, also from the Department of
16 Justice, and we also have Callista Puchmeyer and James
17 Burke from NASA.

18 THE COURT: Okay, good to have you all with us.
19 And from the Plaintiff's side?

20 MS. HEISCHMIDT: Good afternoon, Your Honor.
21 Christina Heischmidt on behalf of Spectre Corporation. I
22 am the attorney of record. And with me today, I have
23 James Wiggin. And, actually, we have a preliminary
24 matter on that --

25 THE COURT: Okay.

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1 MS. HEISCHMIDT: -- as I understand --

2 THE COURT: Okay, I seem to remember, yes.

3 MS. HEISCHMIDT: So I was wondering if we could
4 address that prior to arguing any motions.

5 THE COURT: Sure. We have admission to the
6 bar?

7 MS. HEISCHMIDT: So, Your Honor, there was
8 actually an issue with that. The certificate of good
9 standing?

10 MR. WIGGIN: I got a certificate of good
11 standing and it was mailed last week by the Ohio Supreme
12 Court, but it hasn't arrived. I had it mailed to her
13 firm's office.

14 THE COURT: Oh.

15 MR. WIGGIN: As well as the check for the
16 admissions fee was being mailed. We do have the letters
17 of recommendation and everything, but we are prepared
18 today to go ahead with that motion, and I have not yet
19 been admitted pro hac vice.

20 THE COURT: Okay. Well, is there any objection
21 to that?

22 MS. ROSE: No, Your Honor.

23 THE COURT: Okay. Well, we'll admit you pro
24 hac vice for today, and next time you come, we'll have
25 your admission --

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1 MS. HEISCHMIDT: We're mailing them in, Your
2 Honor.

3 MR. WIGGIN: We'll just submit it with the
4 Clerk of Court. We'll use their procedure.

5 THE COURT: Okay.

6 MS. HEISCHMIDT: Thank you very much.

7 THE COURT: Sounds good.

8 MR. WIGGIN: Now while I'm on my feet now that
9 I'm admitted pro hac vice, Your Honor, the other motion
10 was I had filed a sur-reply.

11 THE COURT: Yes.

12 MR. WIGGIN: Peter Gwynne, who was the original
13 attorney for the Justice -- I talked about me of these
14 things with him and -- but anyway, when I filed the sur-
15 reply, he objected to that very much and he filed a
16 motion to strike. And we fully briefed that, which is
17 the other motion that's up today.

18 THE COURT: Correct.

19 MR. WIGGIN: I notified counsel for the
20 Government yesterday -- I thought about it on the drive
21 out here and I thought there's really no need for my sur-
22 reply anymore since we're having oral argument. Judge
23 Firestone had not shown any inclination to set it for
24 oral argument, so I want to have -- well, they accused me
25 of wanting to have the last word, which I guess I wanted

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1 that.

2 THE COURT: Okay.

3 MR. WIGGIN: But it was -- I felt that there
4 were a few things I wanted to put on the record. So as
5 interesting as some of the procedural issues in that
6 might be, I am -- we are prepared to withdraw that sur-
7 reply, which will moot the motion to strike and save you
8 a lot of time.

9 THE COURT: Okay, thank you very much. That
10 gets rid of something that I think would probably waste
11 time, because one of my philosophies is always in order
12 to help the judge understand the case, oral argument is
13 really very necessary and very useful. And if someone
14 has something to say, I want to hear it. So I don't -- I
15 think a lot of people want oral argument to go back and
16 forth and, you know, without any particular limit as
17 generally I've found that people don't abuse that.
18 People don't want to tell me things that have no
19 relevance to the case. They generally want to make a
20 point.

21 And I've found our bar is pretty good. They're
22 very -- they're not very often repetitive and -- so if
23 we've got anything to say, we'll hear it because,
24 obviously, that's the only way I can fairly decide the
25 case if I basically hear all the arguments and all the

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1 points. So we'll let everyone make their points,
2 withdraw -- that will clean up the docket a little bit,
3 withdrawing two motions, a sur-reply and then their
4 motion. And -- now, of course, in this day and age, it
5 doesn't really make as much difference because it isn't
6 really on the docket; it's in an electronic cyber docket
7 (inaudible).

8 So, anyway, Ms. Rose, do you want to begin
9 since it's the Government's motion?

10 MS. ROSE: Thank you, Your Honor.

11 May it please the Court. The Court should
12 grant the Government's motion to dismiss because Spectre
13 has not and cannot state a claim upon which relief may be
14 granted.

15 There are three independent bases for granting
16 the Government's motion. First, by its own admission,
17 Spectre has failed to meet its financial obligations
18 under the Space Act Agreement. Because Spectre never
19 paid the full \$80,000 due prior to the start of NASA's
20 work on Milestone 3, NASA had no obligation to perform
21 any activities under the contract after Milestone 2.

22 Second, the Space Act Agreement and Licensing
23 Agreement include express disclaimers of warranty and
24 liability and those express disclaimers preclude
25 Spectre's claim. And, third, the Space Act Agreement and

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1 Licensing Agreement include express disclaimers of
2 damages, which would preclude Spectre from any recovery.
3 And I'd like to talk about each of those in a little bit
4 more detail.

5 I had the ELMO working before. I'll see if I
6 can do it again.

7 THE COURT: Okay.

8 (Pause in the proceedings.)

9 MS. ROSE: This the Space Act Agreement, which
10 is Exhibit 2 to the complaint. Within that, I wanted to
11 direct the Court's attention to Article 5, Financial
12 Obligations. In this, the payment obligation schedule is
13 clearly delineated. First, Spectre was required to pay
14 \$100,000 prior to the initiation of any work and that
15 payment was made. Next, Spectre was required to pay
16 \$80,000 prior to the start of Milestone Number 3 and that
17 payment was not made in full.

18 At this point, I do need to correct one mistake
19 from the Government's briefing. In our briefing, we
20 stated that Spectre's complaint acknowledged that it had
21 not paid -- that it had only paid \$125,000 under the
22 Space Act Agreement.

23 THE COURT: Yes.

24 MS. ROSE: In fact, it had paid \$165,000 under
25 the agreement. And it takes some teasing out, but that

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1 is clearly acknowledged in the complaint and that \$65,000
2 payment is, of course, short of the full \$80,000 payment
3 that was the condition precedent before NASA was required
4 to start any work with -- starting with Milestone 3.

5 THE COURT: So the first payment made in that
6 list -- the first \$80,000 was only \$65,000?

7 MS. ROSE: Correct, correct. And this is
8 important because the allegations of breach are
9 allegations of NASA's alleged failure to deliver sensors
10 under the contract, deliver information under the
11 contract, but none of NASA's deliverables were triggered
12 until Milestone 5 for information and Milestone 6 for
13 delivery of the first run of sensors.

14 THE COURT: Hmm. Well, here, I guess Milestone
15 3 is the first \$80,000 and the second one -- Milestone 8
16 has to, I guess, go forward.

17 MS. ROSE: Correct. And there is no payment
18 after the \$65,000 portion required prior to Milestone
19 Number 3.

20 THE COURT: So there was no payment of
21 \$100,000?

22 MS. ROSE: There was the payment -- the initial
23 \$100,000 and then 65 of the 80.

24 THE COURT: Yeah.

25 MS. ROSE: But that 165 represents the full

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1 amount of Spectre's payments and, again, because Spectre
2 was required to make these payments before -- before
3 NASA was required to perform the milestone activities, it
4 is -- it is a condition precedent and as their statement
5 says, without this activity being performed by Spectre,
6 the obligations were never triggered and NASA's
7 performance obligations were never due.

8 THE COURT: Mm-hmm.

9 MS. ROSE: I'd also like to talk a little bit
10 about the background of Space Act Agreements. Spectre's
11 claim arises from its goal of using NASA's patented
12 technology for the manufacture and sale of high pressure
13 sensors. And within NASA's jurisdiction, they have the
14 ability to enter into certain agreements, including Space
15 Act Agreements. But there's a couple of different kinds
16 of agreements.

17 Here, this is the first page of Exhibit 2, the
18 first page of the Space Act Agreement. This is clearly
19 labeled as a fully reimbursable Space Act Agreement.
20 That matters for a couple of reasons. First, a fully
21 reimbursable Space Act Agreement is one that permits the
22 partner here, Spectre, to use NASA's goods, services,
23 facilities or equipment to advance the partner's own
24 interests. It's not for NASA's mission objections. It's
25 really to enable a private -- a private partner, like

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1 Spectre, to use NASA's technology to further their own
2 interests.

3 And because they're using the technology to
4 further their own interests, there's a very specific
5 allocation of risks and the risk is placed on the partner
6 so that we don't have a situation like this here where
7 NASA is being -- facing challenges for damages. And
8 there are a couple of different ways in which that's
9 articulated.

10 THE COURT: Well, is that -- is there a real
11 contract here? Is the Plaintiff getting anything? It's
12 getting NASA's promise that if they want to perform, they
13 will. It did remind me of a Monty Python episode where
14 the bishop has got this insurance policy and comes into
15 the sleazy insurance agency and he says, oh, I got a
16 claim. And he says, no, you bought the no-claim policy.
17 It has this provision that any claim will be denied. It
18 was a little cheaper, but you chose that one. Is this --
19 I mean, is there anything that NASA could do that would
20 invoke liability?

21 MS. ROSE: Yes. The boundaries, however, are
22 limited to bad faith and willful misconduct or criminal
23 activity. Short of that, there's -- the liability has
24 been -- has been waived by Spectre and warranties have
25 been disclaimed by NASA. This is something that is made

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1 known to parties who wish to enter into these Space Act
2 Agreements for their own profit, very much up-front. The
3 briefing references and the complaint also references the
4 Space Act Agreement Guide and that Space Act Agreement
5 Guide clearly sets forth this allocation of risks. And
6 the allocation of risks is going to be different
7 depending on what type of Space Act Agreement it is.

8 But where it is a fully reimbursable agreement
9 for the benefit of the partner, there is an unequal
10 allocation of risks and it is Spectre who bore the
11 risk --

12 THE COURT: Well, would this risk mean that if
13 NASA decided -- I think in Plaintiff's brief, they used
14 the example of the blueberry muffins. If NASA delivered
15 a tray of blueberry muffins, would that leave no
16 liability on NASA's part then?

17 MS. ROSE: You know, I, again, think then you'd
18 have to ascertain whether that was -- represented good
19 faith efforts on NASA to perform under the contract.
20 Putting said blueberry muffins, we're dealing with, you
21 know, very sophisticated technology, things that are on
22 the cutting edge of technology. To the extent that the
23 parties performed and what was delivered was something
24 that was not what Spectre wanted, but was the result of
25 the good faith efforts, then that would be --

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1 THE COURT: So there is a good faith effort
2 required. So NASA could not just say, we're not
3 delivering anything.

4 MS. ROSE: Right.

5 THE COURT: They couldn't do that.

6 MS. ROSE: That's right.

7 THE COURT: That would make them liable for --
8 now, if they delivered something that was defective, that
9 would be a warranty issue and that would -- they would be
10 not liable for that, is that correct?

11 MS. ROSE: Correct, I mean, absent some
12 evidence of --

13 THE COURT: Bad faith.

14 MS. ROSE: -- you know, willful and --

15 THE COURT: Right.

16 MS. ROSE: -- willful intent to make the
17 products defective. And, here, although Plaintiffs used
18 the word "bad faith," we do not believe that there is
19 anything in their complaint that actually rises to the
20 level that would be required for a 12(b)(6) showing of
21 bad faith and, specifically, their allegations don't
22 demonstrate a specific intent by NASA to harm Spectre,
23 which would be required.

24 THE COURT: Now, under the Government's
25 interpretation of the contract, it would appear that

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1 NASA's appropriate legal right, at least, would have been
2 to do nothing until the money came in. So there would be
3 no sensors delivered. Though as I understand it from the
4 facts, there were three sensors or a question about the
5 effectiveness was also there, but there were some sensors
6 delivered. Do you know why that occurred or is there --

7 MS. ROSE: Yes. I mean, NASA was undertaking
8 every effort to perform under the contract and that
9 included performing delivery of certain sensors that were
10 -- that they were able to create based on the funds that
11 had been transmitted by Spectre. And we would note,
12 however, that NASA's continued performance is still -- is
13 still not yet due, even with those good faith efforts,
14 because there was no obligation of NASA to do anything
15 starting with Milestone 3 because that payment had not
16 yet -- had not ever been made.

17 THE COURT: Okay.

18 MS. ROSE: Within the Space Act Agreement,
19 Article 14 includes the disclaimer of warranty and
20 represents that -- it represents the agreement that
21 equipment, facilities, information and services
22 provided --

23 THE COURT: Right.

24 MS. ROSE: -- would be provided as is. And it
25 also -- at the end of the paragraph is a disclaimer of

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1 damages.

2 THE COURT: So a lot of -- that many times over
3 for -- in the various briefs. So, yeah, I know all of
4 that.

5 MS. ROSE: Okay. And the licensing agreement
6 similarly contains very clear waivers of liability and
7 damages in the sections outlined in the briefs.

8 THE COURT: But the licensing agreement
9 isn't -- the contention is that they've got -- the patent
10 or the agreement was terminated and no licensing was ever
11 done.

12 MS. ROSE: Correct.

13 THE COURT: Or no licensing by the company was
14 ever used to produce anything that produced profit.

15 MS. ROSE: That's right. The Space Act
16 Agreement expired by its own terms three years after it
17 was signed and the licensing agreement was terminated by
18 NASA.

19 THE COURT: Okay.

20 MS. ROSE: And unless the Court has further
21 questions at this point, I'll reserve any further
22 comments to be in response to the Plaintiff's.

23 THE COURT: Okay, thank you, Ms. Rose.

24 Now, who is going to -- Mr. Wiggin, you're
25 going to --

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1 MR. WIGGIN: I will, Your Honor.

2 THE COURT: Okay. You may approach the podium
3 of your newly admitted to court.

4 MR. WIGGIN: Thank you. I didn't notice, do
5 they still call these Oscars or --

6 THE COURT: They used to be called Elmos.

7 MR. WIGGIN: Elmos, whatever they were.

8 THE COURT: The Elmo.

9 MR. WIGGIN: Elmos, that's right. I didn't
10 know those were going to be available. I do have -- I
11 did make copies of a few of the Space Act Agreement
12 articles for the Judge's --

13 THE COURT: The "Oscar" one is all red and
14 fuzzy.

15 MR. WIGGIN: And I'll hand them over to you and
16 I'll hand them -- if it would be useful for you to have
17 the --

18 THE COURT: Yes, yes, it probably would. Or
19 you can try putting it on the Elmo.

20 MR. WIGGIN: Well, I made --

21 THE COURT: I always get Elmo and Oscar
22 confused from my --

23 MR. WIGGIN: -- I made copies for everybody.

24 THE COURT: -- kids' TV watching years ago.

25 MR. WIGGIN: Here's -- this is the entire --

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1 this is the entire contract in case you want to flip
2 through that.

3 THE COURT: Okay.

4 MR. WIGGIN: I also have Article 2, which is
5 the purpose.

6 THE COURT: Okay.

7 MR. WIGGIN: Article 8, which I'm going to say
8 something about.

9 THE COURT: Okay.

10 MR. WIGGIN: And these -- yes, article -- the
11 termination clause, Article 18, and Article 14, the
12 famous disclaimer of warranty. And I just made
13 individual copies of those so that we could --

14 THE COURT: Okay.

15 MR. WIGGIN: -- have them available.

16 THE COURT: Okay, you may approach the bench,
17 sir. Thank you.

18 Well, the first thing actually I'd like to
19 focus on is the money.

20 MR. WIGGIN: Mm-hmm.

21 THE COURT: I mean, is there any obligation on
22 the part of NASA to perform without the money?

23 MR. WIGGIN: Well -- and I understand they
24 argue that these are conditions precedent and there is
25 one case they cite on that point -- I forget the name --

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1 although in that case, there was -- as I understand it,
2 there was one payment due which was an up-front payment
3 that was done as a condition precedent. It hadn't been
4 made. Pretty clear case.

5 I did want to mention that I drafted an
6 extraordinarily long complaint for me. I'm usually more
7 succinct, but I did it for a couple of reasons. One, I
8 wasn't really sure how the Iqbal doctrine is treated in
9 this Court. But I also wanted to be sure that there were
10 -- knowing that the Justice Department was probably not
11 very familiar with what goes on over at NASA, I wanted
12 there to be lots of facts in there for them to take a
13 look at. Since they haven't raised any Iqbal questions
14 or an issue, I will remind everybody that under 12(b)(6)
15 for purposes of this motion, all of the factual
16 allegations that are contained in that complaint are to
17 be taken as true by the Court. The well pleaded factual
18 allegations --

19 THE COURT: Correct.

20 MR. WIGGIN: -- and I would hope that you'll
21 find most of them well pleaded.

22 As to the money issue, I wasn't intending to
23 address that until later on, but it's our position
24 that -- I mean, there's a few things that you should
25 know, first of all. One, my client is a very small

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1 business. What's the relevance of that? I mean, they
2 should be treated like any other business, I suppose,
3 except for the fact that as part of NASA's mission, when
4 it doles out these contracts, it's supposed to dole out
5 contracts to small businesses for the purpose of allowing
6 them to compete with bigger businesses and to grow
7 commerce, which was the State of Ohio's goal in having
8 this whole grant program that I'm going to be talking
9 about later that NASA says is completely beside the
10 point.

11 But just to put in context the monetary things
12 -- and I do maintain that to understand this case, you
13 have to look at the Space Act Agreement in the context of
14 the other agreements that were entered into. The grant
15 agreement with the State of Ohio, which NASA -- they say,
16 well, we helped out Spectre in doing this. But, in fact,
17 NASA -- Dr. Okojie, in his office, wanted to
18 commercialize this technology. Now, the Government says
19 this is a gratuitous contract; NASA's really just doing
20 this for the benefit of Spectre. That's not true.

21 NASA has been working on this technology since
22 at least the mid-1990s when it paid the -- it funded the
23 Ph.D. program for the scientist who was involved when he
24 was getting his Ph.D. His Ph.D. research was devoted to
25 doing something for the benefit of NASA. They then hired

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1 him after he got his Ph.D. and he has spent the previous
2 20 years working on this technology, mostly towards one
3 goal, which is to be able to provide to NASA high
4 temperature pressure gauges that they can use in their
5 rocket engines and their test stands and their jet
6 engines and their Mars rovers and their reentry vehicles,
7 all of which need to sense pressure at high temperatures.

8 THE COURT: Yes.

9 MR. WIGGIN: So NASA had -- if my client had
10 gone ahead and commercialized this technology, NASA would
11 have a seller to go to in order to buy pressure sensors.
12 It wouldn't have to make them for itself. And there is
13 nobody out there that NASA can buy these things from.
14 Nobody.

15 So that was one sense in which this was not a
16 gratuitous program. NASA joined with my client in making
17 this pitch to the State of Ohio for the grant money.
18 Now, my client couldn't have made that alone. They had
19 to partner with another governmental entity or an
20 educational institution, and they partnered with NASA and
21 they partnered with the Lorain County Community College,
22 which was going to do some work study stuff to throw in
23 here. But, basically, this whole thing was instigated by
24 NASA, as I alleged in the complaint.

25 NASA could not apply for the grant money

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1 because the governmental entity involved could not apply.
2 It had to be a private business.

3 THE COURT: Yes.

4 MR. WIGGIN: And this grant was supposed to go
5 to small businesses and the State of Ohio was going to
6 help get them through what they called, in MBA talk --
7 there was all sorts of touchy-feely MBA stuff here, and
8 there was this valley of death that you have to get new
9 businesses from, entrepreneurial businesses because
10 that's when they usually fail. And the State was going
11 to help my client get through that valley of death.

12 But what my client ran into -- because they
13 signed the agreement, NASA was a collaborator, and as a
14 collaborator, they signed on with a letter of intent
15 saying we will be a collaborator here. They were
16 supposed to be a subcontractor. They were supposed to be
17 an actual subcontractor like you'd see on a construction
18 project, but the Government -- the Federal Government
19 doesn't -- it doesn't act as a subcontractor. So instead
20 of that -- instead of entering into a subcontract which
21 would have properly imposed contractual obligations on
22 NASA, it was run through my client's contract and were
23 actually owed to the State of Ohio.

24 Instead, NASA -- five months after the grant
25 was awarded, NASA got around to signing the Space Act

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1 Agreement. It took another five months to get the
2 license agreement signed. And in the meantime, the State
3 of Ohio will only put out grant money on a reimbursable
4 basis. So this whole thing is being delayed and Ms. Rose
5 said -- well, implied it was being delayed because my
6 client was delaying things.

7 My client had a factory of people that it had
8 just set up in Ohio after they moved their operations to
9 Ohio to hire Ohio employees. They did that immediately
10 so they would be ready to go because Dr. Okojie at NASA
11 said, we'll get this off -- and the people in the
12 Technology Transfer Department at NASA said, we'll get
13 this off the ground, lift-off, once we get this grant
14 money.

15 And, instead, what they ran into were all these
16 bureaucratic delays because there had to be all sorts of
17 approvals and for the -- I mean, they couldn't do this
18 until they did that, they couldn't get -- license a
19 patent until they published it in the Federal Register
20 and went through a whole bunch of -- you know, giving the
21 public a right to object and say, no, license those
22 patents to me. And so they were all sorts of delays.

23 And the other thing that we ran into was a huge
24 -- my little tiny client was placed in this horrible
25 position between two mammoth bureaucracies. NASA, which

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1 would only do anything if it got paid up-front, and the
2 State of Ohio, which would only disburse grant funds as
3 reimbursement for monies already spent on approved grant
4 purposes.

5 THE COURT: Mm-hmm.

6 MR. WIGGIN: So until this \$100,000 could be
7 paid to NASA to get the thing off the ground, the State
8 of Ohio said, we're not going to give you that \$100,000
9 up-front. Now, they could have, but they didn't. So
10 NASA said -- well, finally, NASA says, well -- and then
11 the State of Ohio says, not only that, we're not going to
12 sign a grant agreement with you until we know that NASA
13 is actually going to do this work that was in your
14 business plan that NASA signed on to under a contract and
15 that NASA is actually going to license this technology to
16 you. Because we're not going to pay you a bunch of money
17 and then find out that NASA isn't going to give you the
18 technology.

19 So for months, the whole thing was in limbo
20 while my client kept employing these people, waiting for
21 this technology to get going. Once NASA got the
22 \$100,000, then it was like, oh, you know, we really can't
23 do anything for like four more months and, you know, the
24 contract says that you'll start to get stuff from us in
25 month three, but it's actually going to be -- and this

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1 was in April of 2012 -- it actually won't be until maybe
2 January of 2013. Then there were further delays from
3 January 2013. And Dr. Okojie, wait, wait, wait, there
4 were more delays. They were like, well, maybe you can
5 talk to Okojie in four months. When they finally get
6 these things, they don't work.

7 In the meantime, they've paid \$100,000 to get
8 the project off the ground; they've paid some more of the
9 second payment that was due; and they're not getting
10 anything from NASA. So is this an anticipatory breach?
11 Instead, NASA is saying, well, we know we haven't really
12 performed what we were supposed to perform up until this
13 point in time, but now we're getting into this point
14 where the next payment is due, \$80,000 more. And my
15 client, if you read the complaint, my client get anything
16 out of them. They can't get Dr. Okojie to talk to them.

17 So I would say -- and when you talk about bad
18 faith, by the way, this contract is -- there are four
19 flavors of Space Act Agreements, four basic flavors.
20 This is one of the fully reimbursable Space Act
21 Agreements. Well, that is the biggest misnomer in all of
22 federal bureaucracy because it's not fully reimbursable;
23 it has to all be paid ahead of time.

24 And after the grant agreement was assigned,
25 NASA said, well, what we'd really like is for you to pay

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1 us the \$468,000 up-front. And my client said, pay the
2 \$468,000? My client, by the way, for every dollar that
3 it got in grant money, it had to spend two additional
4 dollars. So to get the \$500,000 to NASA that it was
5 going to get, that was all grant money. All of that was
6 coming from the State of Ohio. To get that \$500,000, my
7 client had to spend a million dollars.

8 And, actually, since the State would only
9 disburse it on a reimbursed basis, to get that million --
10 to get the \$500,000 to NASA, my client actually had to
11 spend a million and a half dollars. \$500,000 would be
12 reimbursed, so they'd net a million. But of the \$2
13 million that they had to spend to get the million,
14 \$500,000 -- a million of that was attributed to this
15 \$500,000 that had to go to NASA.

16 Now, this is fully reimbursable. But if you
17 get into the regulations and NASA's a big --

18 THE COURT: Let me just go back over this.

19 MR. WIGGIN: I'm sorry.

20 THE COURT: Ohio would not -- why would Ohio
21 not come up with the money? I saw that Ohio was -- you
22 know, the Ohio agency or whatever it's called,
23 (inaudible) something -- it's suing now for, what,
24 \$345,000.

25 MR. WIGGIN: Under the grant agreement, my

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1 client had the duty to account to Ohio for all of the --
2 wherever the grant money ended up being spent.

3 THE COURT: Right.

4 MR. WIGGIN: They had to account for it in
5 their books and records and they had to be able to
6 account for it with invoices to show that the money was
7 spent properly. Now, unfortunately, because -- unlike a
8 lot of these grants where a grant is for just one little
9 specific purpose, this was for one specific purpose,
10 which was to commercialize NASA's technology. But it
11 involved my client's entire operation because they were
12 already manufacturing what I would call Version 1, V.1,
13 pressure sensors which were silicon.

14 Oh, by the way, do you mind, Shari? I've
15 showed you this. I thought you might be curious about
16 this so I brought one of the things that was delivered by
17 NASA. Do you mind if I show the Judge? Whoops, I just
18 broke the water. Anyway, what I'm handing you is is --

19 THE COURT: Well, there's a disclaimer on it,
20 so you don't have to worry.

21 MR. WIGGIN: That's what's called a sensor
22 module, Your Honor. But if you look at the very end of
23 it, that little tiny, less-than-a-quarter-inch-square
24 thing that you see there is either one of the silicon
25 carbide dies --

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1 THE COURT: Yeah, it looks like --

2 MR. WIGGIN: -- or it protects the die which is
3 underneath it. But that's the size of the dies. And
4 what it's mounted on there is what we call the header.

5 THE COURT: This is a -- this thing here?

6 MR. WIGGIN: What?

7 THE COURT: The rod here?

8 MR. WIGGIN: Well, yes, this up here --

9 THE COURT: The header.

10 MR. WIGGIN: And I'll be talking about this a
11 little later. But one of the patents -- the second
12 patent that was licensed involved one thing only, one
13 technology only, which was it solved the big problem of
14 how do you mount the silicon carbide die, that little
15 delicate piece of rock --

16 THE COURT: Right. Yeah, this piece, right?

17 MR. WIGGIN: Yes, so there's some -- how do you
18 mount that to a header and then expose that in a secure
19 enough way so that it's secure and it's airtight and
20 sealed, which it has to be for sensing pressure. But the
21 problem you run into -- I know that you've probably seen
22 lots of intellectual property cases -- I don't know about
23 your engineering background. But when you heat materials
24 up, materials all expand, and when you heat them up to
25 really high temperatures, they expand a lot more.

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1 Now, for each material, there's something called the
2 coefficient of expansion. Different materials have
3 different coefficients.

4 Now, if you think of that die as a membrane say
5 with the head of a drum that over the rim of a drum --

6 THE COURT: Right.

7 MR. WIGGIN: -- if you think of the drum rim
8 expanding at a different rate than the -- if it expands
9 faster than the drum head, it can stretch it so tight
10 that it tears. If it expands slower than the drum head,
11 the drum head can bubble up and get deformed. So the big
12 secret that nobody could figure out is how do we mount
13 this once we have it on something that will be -- that
14 will not rupture or get damaged when they both get heated
15 up to 600 Celsius.

16 And that was the second patent. So that's what
17 you have right there in your hand. That was -- now,
18 these -- the way this contract read was that NASA would
19 be delivering between 36 and 60 of those as part of each
20 fabrication run.

21 THE COURT: As just the top part or the whole
22 thing?

23 MR. WIGGIN: That whole thing there. And that
24 would go inside a housing made by my client who would be
25 connected to some circuit boards that were specially

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1 engineered to translate the signal coming off of that
2 into intelligible information. And for each application,
3 depending on where you put it to measure pressure, you
4 might have a different kind of housing.

5 My client already had a line of all this stuff
6 and under the business plan that was submitted by NASA
7 and my client to the State, NASA would produce those, my
8 client would engineer additional new circuit boards to
9 work with that technology and would put them in the --
10 substitute those in to make V.2, Version 2, 2.0 of my
11 client's product line with super space-age NASA
12 technology.

13 So the business plan was to move the factory,
14 hire Ohio workers, train them, put them to work making
15 the original product line, and wait for NASA to come up
16 with these things so we can start putting them into the
17 original product line, bringing investors in, demonstrate
18 them to investors. We had people waiting in the wings to
19 invest money which would take care of all these
20 expenditures; show them to international distributors who
21 were going to pay fees to have the rights to market them;
22 show them to customers who were waiting to pay premium
23 prices just to get one of those in their hands so that
24 they could put it to work to save them a lot of money.

25 THE COURT: Mm-hmm.

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1 MR. WIGGIN: I forgot where I was going with
2 that, but -- so as far as payment in advance, there were
3 these big delays and --

4 THE COURT: Well, I mean, the story is of a
5 complex nature.

6 MR. WIGGIN: Oh, you wanted to know about the
7 accounting. Well, what happened was as these delays kept
8 going on and on and on, like the things that were
9 supposed to be done with the money, some of it happened,
10 but some of it didn't happen because NASA hadn't
11 delivered. So Lorain County Community College was
12 waiting for these things so it could start developing
13 some things with its students and doing some work. It
14 was never able to do that stuff.

15 In the meantime, all of my client's overhead
16 was going on and on and on and on and they used some of
17 the money to keep all of that going, which I'm arguing
18 that the State of Ohio fulfilled the -- part of the --
19 most of the purpose of the grant, which was to hire Ohio
20 workers, earn Ohio taxable income, increase the tax base.

21 But when my client, who are some engineers and
22 they're really bad at accounting, and so when the state
23 auditor came to look at the books and records and spent a
24 day there, they had a hard time verifying much of
25 anything. They wrote an audit report saying there's

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1 \$348,000 that can't be accounted for, because my client
2 got about \$900,000, by which time NASA pulled out and
3 said we're not doing anything anymore.

4 My client then made some further showing to
5 them and that number got adjusted downward and there
6 still is a lot unaccounted for, although actually other
7 than the fact that the money that should have been spent
8 for Lorain County Community College to do stuff and the
9 rest of the money that should have gone to NASA had
10 everything -- had NASA performed as it was supposed to
11 perform, that money was spent on other overhead and on --
12 because my client, in the meantime, has manufactured
13 about 15,000 of these sensors of its Version 1.0 and
14 shipped them out to customers and continued to make
15 money. And so some of the money was going towards the
16 overhead for that endeavor.

17 And that's why I'm hoping to settle this by
18 proving to the State of Ohio that actually this was -- as
19 I say, it wasn't spent on cocaine and dancing girls,
20 which is what the auditor is usually looking for, or
21 gambling debts. It was spent on legitimate purposes
22 although they were not quite the purposes that were in
23 the original budget.

24 THE COURT: Mm-hmm.

25 MR. WIGGIN: Now, the original budget was

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1 submitted way, way back before these contracts were
2 entered into. And by the time -- by the time that the
3 grant was awarded, NASA was already talking about
4 charging \$85,000 more than their original estimate. As I
5 said, we didn't get the Space Act Agreement for months,
6 months down the road and then didn't get the license
7 agreement. \$50,000 of this money went to NASA for the
8 license agreement.

9 Now, they often -- they've announced -- you
10 know, they said to us, this is for the license, it has
11 nothing to do with our work, which I admit is true.

12 THE COURT: Right.

13 MR. WIGGIN: But on the other hand, it was
14 nonrefundable and it paid to get some patents that we
15 haven't benefitted from at all. The other issue under
16 the license agreement was that we committed to pay \$5,000
17 annual minimum royalties through 2025. So -- but I did
18 discover, Your Honor, that in the NPD, which is the NASA
19 Policy Directive, which is one of the official things
20 they put out to enact their regulations under the
21 statutes, the NPD, which has been around forever, says to
22 NASA, when instructing NASA's people how to enter into
23 one of these fully reimbursable Space Act Agreement says,
24 you should always be paid up-front.

25 But if the party you're dealing with, your

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1 partner, has to make a bunch of capital investments and
2 it would be a hardship to them to have to pay NASA ahead
3 of time for things, then you shall waive that agreement -
4 - that requirement. You shall. The language that it
5 uses in the policy directive is "you shall" waive that
6 requirement in order that undue hardship not be inflicted
7 on your business partner and that this whole project can
8 move forward.

9 Now, NASA -- you want to talk about bad
10 faith -- or not bad faith, lack of good faith, NASA's
11 contract negotiators never mentioned anything about that.
12 Instead, they said, we want \$348,000 up front -- or
13 \$438,000 up front. What NASA did agree to break this
14 down a little into these -- into these phased payments,
15 but they said that's all you're getting and they never
16 bothered to mention, by the way, if this is going to be a
17 hardship on you, which obviously it would be because we
18 couldn't get the money from the State ahead of time --
19 but by the way, we can waive all this. Because they knew
20 that they were going to get the money from the State, but
21 they never mentioned it. And they certainly didn't put
22 it in effect.

23 And then they said over and over and over
24 again, despite the fact that they weren't delivering
25 anything, they said, by the way, when's our next payment

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1 coming? Now, my client wanted to know what in the world
2 did you do with the \$100,000. Because all they were
3 supposed to do in the first -- in these first few phases
4 -- the first phase was design. They took the stuff --
5 and you can see this here in the -- it's in Article 3B
6 and it's mentioned in the purpose, by the way. You can
7 see all these specs that are laid out. Those were my
8 client's specs and it says right there -- I gave you --
9 it says right there --

10 THE COURT: It's Article 3B?

11 MR. WIGGIN: 3B(1). It's on page 3 of 17.

12 THE COURT: Okay.

13 MR. WIGGIN: It says right there this is the
14 first thing that NASA is supposed to do. It says, "NASA
15 has reviewed and agreed upon the desired electrical and
16 physical characteristics supplied by Spectre." Now, if
17 you go down to the end of that paragraph, you'll see in
18 all caps, "DESIRED ELECTRICAL PERFORMANCE."

19 THE COURT: Yes.

20 MR. WIGGIN: That's a head -- that should be a
21 heading. But below that, down to 2, that's NASA's
22 summary of my client's total input into this contract.
23 All that my client put into this contract are those
24 specs. And at the very beginning of that paragraph, it
25 says, "NASA has reviewed and agreed." And what they

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1 agreed to was we can do this. They agreed we will
2 engineer three different pressure centers to three
3 different -- one to 150 PSI, another to 500 PSI, and a
4 third to 1,000 PSI. We will engineer and design those
5 three.

6 Now, we had every reason to expect they could
7 do that because Dr. Okojie had been working on this for
8 20 years. And from time to time over the years, my
9 client had touched base with him and said, is this stuff
10 ready yet. And it turned out it wasn't ready. And so my
11 client, who was a little small guy, he couldn't do
12 anything. He can't do millions of dollars of R&D. But
13 the whole reason that they went forward with this is
14 because Dr. Okojie finally said, wow, we're ready to go
15 forward and here's this million-dollar grant program. So
16 they applied for the thing and there was a business plan
17 that didn't say, well, NASA will try to do this and NASA
18 will use reasonable efforts to do this and NASA might not
19 be able to do this, and if it can't do this, too bad.

20 What NASA said to the State of Ohio was, we
21 will do this. We will design these. We'll figure out a
22 way to fabricate these. We will make a certain number of
23 them to go forward with the business plan. And after
24 that, we will teach Spectre how to do this so that they
25 can continue to do it themselves through 2025.

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1 And the State of Ohio had a company on board --
2 this is alleged in the complaint. It was called Teratech
3 Corp. And they were a bunch of engineers and specialists
4 and they had them on board to review all these
5 applications. And when Teratech reviewed this
6 application, they had a ceramics engineer who knew this
7 stuff inside out. He knew all about the efforts to try
8 to come up with a silicon carbide pressure sensor and he
9 submitted written questions that NASA had to respond to
10 and they had to get together a meeting where the
11 scientists from NASA came down and he had one question
12 for them. Can you do this and will it really have zero
13 drift up to 300 Celsius? That meant something to all
14 these people. And what will the drift be up to 600
15 Celsius?

16 And NASA said, absolutely, we are firmly
17 committed to this, we are behind it and there is zero
18 drift up to 300 Celsius. And the consultant who's being
19 paid by the State of Ohio to protect the State of Ohio
20 said, that's all I need to hear. And he told the State
21 of Ohio this is one you should take because there's a
22 great prospect here.

23 So when we talk about this as being a research
24 and development project --

25 THE COURT: Well, was he wrong on that?

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1 MR. WIGGIN: Well --

2 THE COURT: I mean, was NASA able to do this?

3 MR. WIGGIN: Your Honor, I don't really know
4 because -- and it's alleged in the complaint, all we ever
5 got after many delays, after the \$100,000 had been paid,
6 after more of the second payment had been paid and after
7 a whole lot of delays and a whole lot of hemming and
8 hawing, all we got were three of those. Dr. Okojie said,
9 well, I'll send you four. I've got two I'll go ahead and
10 send you and I have another two I'll send you, but he
11 ended up only sending one more. And they were all
12 supposed to be 1,000 PSI. One of them was broken.

13 Now, Dr. Okojie is only -- he's four minutes --
14 he's only four miles away from Spectre. They're at the
15 Cleveland Airport. And my client's west of there. They
16 just had to deliver this four miles. One of them was
17 broken, it didn't work at all. That was confirmed. The
18 other two, one of them was 1,000 PSI. It tested out to
19 that. The other one tested out to 500 PSI. It was
20 supposed to be 1,000, but it was 500. Dr. Okojie said,
21 this is really interesting. We measured this and it
22 turned out to be 500. Hmm, I wonder why.

23 Well, my client then tests -- tried to test
24 these things and get them to work right. Never could.
25 Couldn't get them to work right. Dr. Okojie sent some

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1 little graphs and said, here are all our test results.
2 My client could never get them to work right. The first
3 thing he said was, well, you guys don't know what you're
4 doing. And they said, well, come on down and -- come on
5 over some afternoon and show us as soon as possible. Ah,
6 I can't do that. Come on over and we'll show you how
7 we're testing this. Oh, I can't do that.

8 Well, my client has taken these things to the
9 experts. They've confirmed that my client is doing it
10 right. In the meantime, my client has manufactured and
11 shipped 15,000 of these things. Every one of them has to
12 be tested. Every one of them has to be custom -- they
13 calibrate them because each one performs a little
14 differently. Every one of them has to be calibrated
15 before they're sent out. My client does all that stuff.
16 So we're fully prepared to go forward and prove that,
17 yes, we did know what we were doing.

18 Now, why would Dr. Okojie say, well, I don't
19 know, there's nothing wrong with these? But they had no
20 more to deliver. We're like where are all -- where are
21 the hundreds of spare dies that we should have -- I mean,
22 loose dies off the wafer, because they make them one
23 wafer at a time, like this big. There's maybe 400 of
24 those. That's what the first patent is all about. The
25 first patent is how do you bulk manufacture hundreds of

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1 these at a time.

2 That's the other thing we licensed, was you
3 show us how to do this, Dr. Okojie, you show us how to do
4 this, and this contract -- the license agreement -- NASA
5 didn't do -- all NASA does is license. That's all they
6 have to do under the license agreement. They didn't have
7 to teach anything. But under the Space Act Agreement,
8 they were supposed to transfer the technology. Now, this
9 is something they do all the time. And I'll show -- you
10 know, we'll go over the -- the language in here says that
11 NASA will get all this data together, do everything that
12 -- as necessary to allow Spectre or its vendors to
13 replicate these three sensors that we have designed and
14 engineered for you.

15 And my client said, well, let us come in and
16 videotape this stuff -- that's what you usually do with
17 something like this -- while you're making it. They
18 said, ahhh, we can't have you in to videotape it, it's a
19 secret, we're licensing it. They said, we'll tell you
20 what, you won't let us in to videotape it or observe --
21 well, let's come in to observe. Ahhh, we can't let you
22 do that. Well, then have one of your people videotape it
23 and give us the videotape. Ahhh, we can't do that.

24 Well, I suspect -- this is what I suspect and I
25 think the discovery is going to show this because it was

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1 written in the complaint, what eventually happened here
2 was that one day after my client had complained to the
3 NASA Inspector General and supposedly was going to have a
4 confidential investigation done about my client's
5 complaints about why nothing was happening despite how
6 much money they spent and why are we getting all these
7 lies. That Inspector General -- assistant whatever he's
8 called, he went right off to NASA's headquarters and he
9 told the management at NASA Glenn about these
10 allegations.

11 And so, all of a sudden, Ms. Rose's predecessor
12 -- actually, Ms. Puchmeyer's predecessor out there at
13 NASA, they started having phone calls and meetings and my
14 client's like, well, thank God, finally we're going to
15 have this meeting where we'll sit down with Dr. Okojie
16 and we'll figure out what's wrong here, because my client
17 still thinks that he's going to get this to work because
18 he has so much invested in it. Instead, counsel for NASA
19 says, oh, no, we're not going to have that kind of
20 meeting, we're going to have a meeting where we talk
21 about what's going to happen with this contract.

22 So when they finally get together, he's got two
23 things. He's got a check for -- actually, my client paid
24 \$170,000 under the Space Act Agreement, but NASA refunded
25 \$5,000 for -- I forget the reason, but they said, well,

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1 we don't -- we owe this back, you paid us too much, and
2 then there was \$50,000 under the license agreement. So
3 he's got two things. He's got a check for \$215,000 in
4 his hand, which is all the money that's been paid and
5 he's got a mutual termination agreement which says, sign
6 this, we're terminating the contract, and you release
7 NASA from any further liability for anything here.

8 Now, I've been around federal contracts and
9 federal agencies to -- I mean, I don't know if this is
10 what happened, but federal agencies don't normally do
11 this. In all of these contracts -- in fact, if you look
12 at the termination clause here, which we're going to look
13 at later, you'll see that it says if NASA terminates this
14 contract, we don't have to give you anything back. We
15 don't have to give you anything regardless of what you
16 got out of us. Ms. Rose was -- she seemed to be kind of
17 proud to tell you about that.

18 But at any rate, it's very unusual for a
19 federal agency who doesn't have to -- NASA does say, in
20 their discretion, if there's some costs that maybe should
21 be reimbursed, we might think about doing that. But in
22 my experience -- and you've heard a lot of these cases
23 for 32 years, I'm sure -- it's very rare for a federal
24 agency to come forward and say, here's a complete refund
25 for all the money that you've paid to us. Now, that

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1 suggests to me that counsel for NASA, in looking into
2 these complaints that my client had, found out that there
3 was something very bad going on inside those labs.

4 Now, I think, frankly, we had to plead this as
5 a breach of contract case, but I think because we
6 can't -- we can't sue the Government for fraud unless I
7 go for a private bill in Congress, which I thought about
8 doing, but I think that it's quite possible that what
9 happened here was fraud. I think we are going to find
10 out that Dr. Okojie never fabricated a wafer, never
11 designed any of these specifically for my client, and
12 that when he -- and that, in all likelihood -- he never
13 numbered them as they were supposed to be numbered, but
14 in all likelihood, when he finally delivered these three,
15 one of which was broken and two of which didn't work,
16 they were some things that were just sitting around the
17 lab for some other customer of NASA that they had been
18 working with.

19 THE COURT: Well, if that was the case, if
20 there was no workable whatever these things are called,
21 the --

22 MR. WIGGIN: Pressure sensors.

23 THE COURT: Pressure sensors, then shouldn't
24 you be asking for restitution, all the monies paid,
25 putting everyone back in the position they were in before

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1 the contract was ever entered?

2 MR. WIGGIN: Shouldn't I be?

3 THE COURT: That seems like a -- yes, shouldn't

4 --

5 MR. WIGGIN: I am. I am asking for the

6 \$215,000 back.

7 THE COURT: It's a total failure -- in order to
8 do that, the Court would have to find a total failure of
9 the purpose of the contract and everyone would be put in
10 the position they were before they met.

11 MR. WIGGIN: I'm not sure. I mean, the measure
12 of damages here -- I mean, I would contend -- and I said
13 this in the response brief -- that this issue of payments
14 is a real issue of fact because --

15 THE COURT: Right, and --

16 MR. WIGGIN: And counsel may not have known
17 this because I know that they -- they're not NASA's
18 counsel and they don't know what happened. But that, in
19 fact, there had been lots of conversations with NASA's
20 people when the State of Ohio was -- and they said, well,
21 if you could just get us \$20,000, if you could just get
22 us that.

23 But the final \$25,000, by the way, Dr. Okojie
24 called up and said, you know, I've got the rest of the
25 sensors that I owe you, the rest of the 1,000 PSI sensors

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1 and so my clients, they -- my client said, well, don't do
2 the 150s and 500s until we have this worked out because
3 we still haven't seen that you're actually making
4 anything that works. He said, well, I have the rest of
5 the 1000s, and there should have been between 36 and 60.
6 So he had already loaded three, so there should have been
7 like -- no, I'm sorry, 12 -- one-third of that, 12 and
8 20. He delivered three. There should have been 9 to 17
9 of them.

10 THE COURT: Mm-hmm.

11 MR. WIGGIN: And instead we got six. He said
12 if you could just pay the \$25,000, then I'll deliver the
13 rest of these. So they paid another \$25,000, even though
14 they had not been shown that anything was being done.
15 And they thought, well, at least we'll get the rest of
16 the 1000s, and they got six. And when they tested them,
17 they were only good to 200. And they emailed Dr. Okojie
18 and they said, well, what are these rated at? We only
19 can test them to 200. He's like, yeah, they're 200.
20 Well, 200 wasn't even in the contract. And that was when
21 my client completely blew his top and went to the
22 Inspector General and said, something weird is going on
23 here.

24 THE COURT: Mm-hmm.

25 MR. WIGGIN: So I don't know. That seemed like

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1 fraud in the inducement. But what we are alleging -- and
2 the reason I think that we have a right to get all of our
3 damages here -- is that NASA gave -- when counsel
4 tendered the \$215,000 and the mutual termination
5 agreement, my client said, well, hold on here, you've got
6 this deadline we have to accept by; I don't have a
7 lawyer; I need to talk to the State of Ohio because I'm
8 worried about my obligations to them. And I can't just
9 release -- I mean, they were supposed to be a
10 subcontractor. I can't just release you from this
11 without worrying about what the State of Ohio is going to
12 say about that.

13 THE COURT: Mm-hmm.

14 MR. WIGGIN: So he tried to talk to the State
15 and then the State was like -- you know, it was hard to
16 get them to do anything. And they're like, can't you
17 talk to NASA and say, just slow this down, hold this off
18 a bit until we can have a big meeting. And they said,
19 well, we'll try to have a meeting. And my client said,
20 well, don't have a meeting without us because he didn't
21 want them to meet with -- the State with NASA because for
22 all he -- he knew what Dr. Okojie was going to tell them.
23 We've done everything right and these people just don't
24 know what they're doing, they can't test them.

25 Well, in fact, the State of Ohio went ahead and

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1 had a meeting with -- well, it was a conference call --
2 with NASA, didn't include my client, and afterwards said,
3 we've heard all we need to hear, you're going to have to
4 deal with this problem, we're not involved. At that
5 point, the deadline came and went. My client did talk to
6 a lawyer who tried and said, well, maybe you should take
7 the money, because I think most lawyers that have ever
8 tried to sue the Federal Government would say, geez, if
9 the Government is trying to give you all your money back,
10 maybe you should take that and run. But -- so they
11 called NASA and NASA said, too late, we're not going to
12 give it back to you.

13 But at that point -- I mean, this was in April
14 of 2014. At that point, NASA said, we're not performing
15 further. We're not performing further. We're not going
16 to perform this contract for you. We don't care if you
17 give us more money, we're not performing it further. And
18 so they just waited it out until the contract terminated
19 in -- I think it was in December, in December of 2014.
20 Seven more months they did absolutely nothing.

21 And so my position is that it didn't really
22 matter. They would say more -- you know, conditions
23 precedent -- precedent were not satisfied. We think
24 we're going to prove that we paid more money than we ever
25 should have paid to them because by the time you got into

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1 the second payment -- and you were asking about this, so
2 I'll point out something sort of interesting. If you'll
3 turn to page 6, which Ms. Rose showed you, the financial
4 -- Article 5, the Financial Obligations.

5 THE COURT: Yes.

6 MR. WIGGIN: Now, notice that the first one,
7 Milestone 3, you pointed out, it says, \$80,000 prior to
8 the start of Milestone 3. Well, it's sort of hard to
9 figure out exactly what that means because if you turn
10 back a page, you'll see that Milestone 3 is defined as
11 NASA completes sensing element test. So the payment is
12 to be made before the start of something, but the
13 something that they're talking about is actually the end
14 of something. Okay?

15 Presumably, if you look at these descriptions
16 here, the first thing they're going to do once they get
17 the \$100,000 is 1 and 2. They're going to design the
18 wafers, they're going to complete the design, and they're
19 going to actually fabricate them. They're going to take
20 these silicon carbide disks, they're going to put --
21 they're going to build up the circuitry inside of a dome
22 with all sorts of high energy and stuff. They're going
23 to build up the circuitry on the front end, they're going
24 to flip it over, they're going to etch out the diaphragms
25 on the back end for hundreds of these at a time. That's

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1 all supposed to be done by the end of the third month
2 from the signing, Milestone 2. So that's included within
3 the 100,000 bucks. Makes sense.

4 Milestone 3 is supposed to be concluded -- and
5 Milestone 4, by the way -- are both supposed to conclude
6 two months later at the end of month five. So where it
7 says payment before the start of Milestone 3, it might as
8 well say, "and Milestone 5," because they're supposed to
9 take the same amount of time. But that is -- Milestone 3
10 is complete sensing -- sensing the elements, and that's
11 they're going to test each one of those 100s and they're
12 going to figure out which ones don't work, get rid of
13 those and take the ones that work and get a bunch of them
14 mounted on the -- mounted on the header.

15 THE COURT: Mm-hmm.

16 MR. WIGGIN: That's "complete the sensing
17 test." Number 4 is complete the header fabrication. So
18 that was supposed to all be done by the time the next
19 \$80,000 got paid.

20 THE COURT: Mm-hmm.

21 MR. WIGGIN: Now, we didn't have any evidence,
22 at the time we made the payment, I don't believe, I might
23 be wrong about this, but we didn't have any evidence that
24 any of it had been done because nothing had been
25 delivered. And, yet, they went ahead and they started

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1 making these payments. And at that point, you know,
2 you're supposed to be in to Numbers 5 and 6, which is
3 covered by that \$80,000, and that's all -- those are all
4 supposed to be completed one month from then. It's just
5 a little additional testing.

6 And then 6 is just putting these things in a
7 box and delivering them four miles down the road. That's
8 Number 6.

9 THE COURT: Mm-hmm.

10 MR. WIGGIN: Because once Number 5 was
11 completed, they're tested, everything's supposed to be
12 delivered. So most of that second payment had been made
13 and none of this had been received.

14 So my position is is that NASA had already
15 breached the contract. NASA had breached the contract.
16 There was not any -- they hadn't proved that they were
17 entitled to any of the money that they had received yet.
18 And they're asking for more money before they'll do
19 anything. And then they come into court and they say,
20 well, you're entitled to anything because you didn't make
21 all these additional payments of 300,000 more dollars.

22 Well, Judge, because in the meantime there was
23 more and more and more delay and then they show up with a
24 check saying, here's your money back, we're not doing
25 anything more. That's anticipatory breach of contract,

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1 repudiation of the contract. So at that point, what were
2 we supposed to do? Were we supposed to write a check for
3 \$368,000 and say, well, here, here's the rest of our
4 money? Hopefully, the State of Ohio will reimburse us
5 for this. We don't know if you're going to do anything;
6 you said you wouldn't.

7 THE COURT: Yeah.

8 MR. WIGGIN: So that's -- and I think there's a
9 bunch of factual issues in there. They had agreed to
10 certain things. And I just don't think that you can
11 decide that issue on a 12(b)(6) motion.

12 THE COURT: Okay.

13 MR. WIGGIN: Now, the Court -- they said I pled
14 myself out of court by saying, well, this one payment was
15 made, but that was really just to establish something in
16 time. Okay.

17 THE COURT: Okay.

18 MR. WIGGIN: That was probably more than you
19 wanted to hear, but, hopefully, that answers the question
20 of what I had to say about the payments.

21 THE COURT: Okay.

22 MR. WIGGIN: Okay. Obviously, I'm a little
23 outraged by all this. The Government has said this case
24 should be dismissed because of the boilerplate in our
25 contract. Now, remember, this contract -- we didn't have

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1 this contract for seven months after the grant was
2 awarded. They said, well, we don't have anything to do
3 with the grant, even though all the money was coming from
4 the grant to pay them. But these terms got agreed to
5 months and months and months after we were already
6 obligated to the State of Ohio under all these things.
7 It should have been a subcontract, but they -- the
8 Government wouldn't do that.

9 They then say -- so there are these limitations
10 that we didn't promise anything to you at all. Now, I'm
11 really glad that you picked up on the blueberry muffin
12 thing because the other part of that -- and I think
13 that's a decent response. We should have rejected it for
14 improper tender. And I think that -- maybe that's what
15 happens because usually when you're talking about
16 warranties -- how I've always thought about warranties is
17 that a warranty is something that usually applies to
18 future performance. It's going to continue to do this
19 for a certain amount of time. It will have these
20 characteristics that you can rely upon.

21 And the warranty is usually something that
22 kicks in after there's been a tender of delivery under a
23 purchase contract and the buyer has a right to inspect
24 the goods that have been delivered, tendered, to see
25 whether they conform or not to the contract.

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1 THE COURT: Mm-hmm.

2 MR. WIGGIN: Okay? So we should have been
3 getting dozens of these sensors that were mounted like
4 that and could have immediately been sent out and shown
5 to our customers, yes, this stuff works, this isn't a
6 dream, it actually works, the future is here. And we
7 should have been able to -- we should have hundreds of
8 more of those, of the loose dies, that we could have used
9 to have Lorain County Community College start to mount
10 them on more of the headers that were being manufactured.

11 Now, one thing I haven't mentioned yet -- it's
12 in the complaint -- I said that that second patent was
13 all about mounting those things. Now, it turns out -- so
14 the whole reason we were licensing the second patent was
15 to find out how to do that, the secret of doing that.
16 And when this contract was first tendered to us by NASA's
17 lawyers, if you will turn to page 4 of 17, Number 5 --
18 that's Activity Number 5. Now, this is after all of the
19 dies have been made, the hundreds of them, and this is
20 when you start to mount these things.

21 It says -- oh, I'm sorry, I meant paragraph 4.
22 It says, "NASA will fabricate ceramic headers."

23 THE COURT: Where is this? What page?

24 MR. WIGGIN: On page 4 of the contract.

25 THE COURT: Okay.

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1 MR. WIGGIN: These are all the things NASA says
2 they will do, okay? This is NASA's part of the
3 performances. Number 4 is header fabrication and
4 assembly. You've got that right in front of you. "NASA
5 will fabricate ceramic headers to the specifications
6 listed in Table 1 above," and then they're going to
7 attach the sensors to the headers. The next sentence
8 says, "The header fabrication and attachment of sensors
9 to the headers will be performed by Sienna Technologies,
10 Woodinville, Washington, at NASA's expense, under NASA's
11 direction."

12 Now, my client had never heard of Sienna
13 Technologies. Here we are seven months after the grant
14 was awarded, going on a year after we first started
15 talking about this, we had never heard of Sienna
16 Technologies. This is the whole second patent. And my
17 client assumed, well, Sienna Technologies is a
18 subcontractor. NASA's going to -- they're going to
19 design these things and they're going to -- and then
20 they're going to farm out manufacturing them and mounting
21 these things to a subcontractor. And that's -- that, in
22 fact, is what happened. The next paragraph says, "They
23 will be delivered back to NASA by Sienna Technologies."
24 Okay?

25 Well, during -- after this was all signed and

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1 after my client paid a bunch of money to them, we got
2 into the part of the contract where the technologies
3 transferred, okay? And we never did get any instructions
4 or specifications for these headers. They never told us
5 what the dimensions were, what the designs were, what
6 materials they were made out of, never got any of that.
7 We never got that from Dr. Okojie.

8 And he said, you're going to have to just
9 figure this out yourself. We're like, we paid you for
10 the patent, we paid you for it. He said, you're going to
11 have to figure it out yourself. And they said, well, at
12 least tell us what the paste is, the conductive paste is.
13 The paste is -- the die is glued down with something
14 called paste, which will cure and it can withstand high
15 temperatures.

16 This is a very special thing because, again,
17 this is something that supposedly Dr. Okojie discovered
18 and he got issued a patent for. And we would -- this was
19 what -- the biggest secret we needed to know is what is
20 that paste, what is that magic substance that holds these
21 things together so when you heat them up to a high
22 temperature, they don't rip apart.

23 THE COURT: Well, wasn't it disclosed in the
24 patent?

25 MR. WIGGIN: It was disclosed that you have to

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1 use a paste --

2 THE COURT: Oh.

3 MR. WIGGIN: -- as part of the method because

4 it was a method --

5 THE COURT: The formula for the paste was not

6 disclosed?

7 MR. WIGGIN: No, no.

8 THE COURT: That was not part of the patent.

9 MR. WIGGIN: It says a conductive paste. It
10 was part of the method, because this is a method patent.
11 It says, do this, do this, do this, here's the design,
12 look at these pictures, do this and do this. So that's
13 why we -- when -- essentially, when he went about
14 pretending to transfer the technology, he always treated
15 this under the -- and he's an inventor, he has more
16 patents than this that NASA now holds, a bunch of them.

17 But he's very familiar with patent law, I
18 guess, and he really treated this as the sort of
19 disclosure of the art that's necessary as a precondition
20 to be issuing a patent, which I'm sure you're aware
21 means, you know, you have to show enough of the
22 technology to enable the -- to comply with the statute
23 and say, okay, this is specific enough for disclosure for
24 us to issue it. His idea was that's the minimum.

25 Now, NASA, since they wanted these sensors and

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1 it was going to make money off of this, we think \$15
2 million through 2025, they should have been head over
3 heels saying, what more information do you need, what can
4 we do to help, how can we make this happen fast? And
5 instead it was like, well, I'm not giving you that
6 information, you'll have to figure it out on your own.

7 We asked, well, what about the masks for doing
8 this -- masks when it was etched from behind, when
9 circuits are deposited with ions on the front, all of
10 that is accomplished with masks. Several layers of masks
11 on the front, one on the back. You know, masks are like
12 stem cells. You know, in grade school that you used to
13 write your name, plastic stencils.

14 THE COURT: Yes.

15 MR. WIGGIN: They're like that except that
16 these are on a microscopic level. You can't see them
17 with the human eye. And this is not a complicated
18 circuit. It's essentially an H. The (inaudible) bridge
19 is an H. The patent on the back is an annulus, like the
20 target symbol.

21 THE COURT: Yes.

22 MR. WIGGIN: But -- so the masks are not
23 complicated geometrically. And you make those and then
24 you use -- a computer program makes them and then you
25 replicate 400 of them on the disk for one big mask that

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1 has all those little ones. My client said, well, where
2 are the masks, when are you going to transfer those to
3 us? Because the contract says they will record the
4 masks. They will record all the data they use and
5 they'll provide it as necessary and required to allow us
6 to make this stuff. Dr. Okojie said, well, you don't get
7 the masks. The contract doesn't say you get the masks.

8 And we then pointed out, the contract says you
9 will record the masks and you will provide all this
10 stuff. And he says, oh, yes, well, the contract says
11 I'll record the masks, but it doesn't say I'll give it to
12 you. I mean, if you want to talk about lack of bad
13 faith...

14 So -- where was I going with all that? At any
15 rate, the technology transfer, we never got to the point
16 -- and we were finally told when we said, okay, we've got
17 to make these things ourselves. Well, at least if we
18 have to design this ourselves, what was the conductor
19 pace? We really need to know that. At that time, they
20 were told, these headers, the materials used in them and
21 the conductive paste, are all the proprietary trade
22 secret information of Sienna Technologies and you can't
23 have it.

24 We paid for this patent and as part of this --
25 it wasn't just because we paid for it because we were

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1 willing to go spend millions of dollars of research and
2 development to figure out how to do it ourselves, we paid
3 for the patent and for the technology transfer in order
4 that this -- all of this could be taught to us. Not the
5 teaching that occurs through reading the claims of a
6 patent, but the teaching that occurs by somebody who
7 actually knows how to practice the patent and has
8 perfected and done all the research and development and
9 says, it's ready for commercialization, it's ready to be
10 manufactured and sent to market, and that's what they
11 told us.

12 So when they point at the -- as NASA's attorney
13 did when he wrote the final agency decision, when they
14 look at the first sentence of Article 2 -- and I gave you
15 a copy of Article 2 -- the first sentence -- and this is
16 part of their boilerplate, you know. "The purpose of the
17 Space Act Agreement is to" blank, fill in what you say
18 the purpose is. And they filled that in. And that is
19 inconsistent with the business plan that they submitted
20 to the State of Ohio.

21 What was submitted was commercialization.
22 We're going to put these things on the market and we're
23 going to sell it to people and make a bunch of money, not
24 we're going to determine whether it's worth putting
25 additional money in for additional research and

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1 development over the next several years in the hopes that
2 maybe we'll discover how to make it. And they told the
3 State of Ohio's consultants that, too. We know how to
4 make it.

5 So my clients, who were not represented by
6 counsel and who basically had this document -- by the
7 way, these contracts are in a computer. They actually
8 have all of -- they said in the brief -- and I know Ms.
9 Rose didn't write the brief -- they said in the brief,
10 oh, the Spectre calls this boilerplate. It is
11 boilerplate. They have -- all of these -- almost every
12 single word that you read in this contract, every chunk
13 of it, is in their manual for how to put these things
14 together.

15 They took their manual and they put their
16 manual into their database -- and I suppose they have
17 some -- a software interface where they can plug them all
18 together and that software also is called SAAM, the Space
19 Act Agreement Maker. That software also tracks all of
20 these steps required by the regulations and their own
21 internal procedures for putting together one of these
22 contracts and reviewing it and approving it and all that
23 stuff.

24 And then I think -- this is what the NASA
25 publication says. So if I'm wrong about this, I hope

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1 you'll tell me about it sometime. But at the end of the
2 day, they also store the finished agreements in there.
3 So they have -- all of this stuff is -- and what you have
4 before you, these are all -- with the exception of a few
5 little words that were put into it to put my client's
6 name in and put in a purpose and these specs and the
7 dollar amounts, everything else is standard language with
8 blanks in it to put those things in.

9 THE COURT: Right.

10 MR. WIGGIN: And this contract was put in front
11 of my clients and basically they said take it or leave
12 it, which you could -- that's what the Federal Government
13 does.

14 So my client didn't really appreciate that some
15 day somebody was going to show up and stand up in court
16 and say, Your Honor, we never said we'd actually make
17 these things or actually design them or actually
18 fabricate them and give them to them; we said we'd try to
19 do this, and it was all for the purpose of figuring out
20 whether it was worth going forward. We'll take a half
21 million dollars plus \$50,000 under the patent agreement,
22 but we never said that we could actually do anything with
23 any of this.

24 So I've got some questions that I think you
25 should ask yourself, the trier of fact someday will ask

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1 themselves when we try to figure out what does this --
2 what do these contracts mean because when you look --

3 THE COURT: These are the questions you had on
4 your reply to the Government's -- it was the list of
5 questions.

6 MR. WIGGIN: Right, right.

7 THE COURT: Yes, I've read those.

8 MR. WIGGIN: And I think if you look at the
9 good faith and fair dealing -- and I have to say, I have
10 read -- I had done some research and I had read this law
11 before I drafted the complaint and I did a real -- I made
12 a real effort to put allegations in the good faith and
13 fair dealing paragraphs about things that were not merely
14 duplicative of contractual performances required by the
15 Space Act Agreement itself. I tried to allege things
16 that were not in the express terms of the contract, but
17 that fell in with the Federal Circuit and the Court of
18 Federal Claims doctrine of good faith and fair dealing.

19 Now, I have to say that having studied that a
20 bit, I have to sort of paraphrase the words of Justice
21 White in the obscenity cases and say, I don't really know
22 what obscenity is, but I know it when I see it.

23 THE COURT: I think it was Potter Stewart

24 MR. WIGGIN: That's right, it was Potter Stewart,
25 I'm sorry. I knew it was a Sixth Circuit judge, but --

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1 it was Potter Stewart, I'm sorry.

2 But you get my point. If you read enough of
3 the Federal Circuit cases, you sort of -- and you try to
4 put them all together and reconcile them with each other,
5 you know -- and by the way, I noticed that the -- on that
6 issue, Ms. Rose invoked the Metcalf case, the trial court
7 in the Metcalf case, which the Metcalf Federal Circuit
8 decision found that the trial judge had incorrectly
9 applied the case law -- the rules that were stated in
10 Precision Pine because Precision Pine, which the Metcalf
11 court said that's a special case, but that was the one
12 where they talked about depriving -- reappropriating the
13 benefit that the contract was supposed to bestow upon the
14 other party.

15 And it wasn't enough that the Government acted
16 to reappropriate those benefits, but they had -- you had
17 to show that they specifically targeted the other party
18 for that -- for that action. And the trial judge in the
19 Metcalf case applied that rule and said, well, there was
20 no specific targeting here. Yes, they did -- I guess you
21 could say that they reappropriated some stuff, but
22 there's no specific targeting here or evidence of any ill
23 will, and so I'm going to find that there was no breach
24 of the duty of good faith. And the Metcalf court said,
25 no, you've got this wrong.

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1 The Precision Pine court did not intend that
2 that is the entire rule of good faith and fair dealing.
3 It's just something that they pointed out that fit the
4 specific facts that were raised by that case, which you
5 might recall involved a different government agency
6 enacting some rules that prevented Precision Pine from
7 logging, and so they wanted to blame it all on the
8 whatever -- the Bureau of Land Management or whoever gave
9 them the logging rights. And the Court said, basically,
10 well, it wasn't their fault, the Government didn't
11 specifically do this to screw Precision Pine, that was
12 just something that happened, so we're not going to let
13 you make the claim. Anyway, the Metcalf case
14 straightened it out.

15 But let me just say that I'm not sure exactly
16 what this all means. Now, to listen to the Government's
17 briefs -- and I think she sort of suggested this today --
18 this disclaimer of warranties -- oh, I'm mixing up
19 subject matters.

20 But consistent with Metcalf, I think you have
21 to say that it's something besides this -- you don't even
22 have to have this specific evil intent on the part of the
23 Government to find that they failed to comply with their
24 duty of good faith and fair dealing. In fact, the Courts
25 have all pointed out that not acting in good faith is

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1 different from acting in bad faith. And we're not
2 suggesting -- well, I don't know, Dr. Okojie may have
3 acted in bad faith. I won't say NASA did all by itself.

4 But in looking at these things, I think you
5 have to ask yourself a number of questions. One is would
6 a tiny family business risk everything, as my client did,
7 if they didn't think NASA would deliver on these
8 promises? They say it's a gratuitous contract. Would a
9 tiny family business have agreed to pay NASA nearly
10 \$500,000 in state grant funds without expecting anything
11 in return? Because that's what they tell you. We don't
12 really have any duties under this contract. This is
13 illusory.

14 Would a tiny family business agree to spend
15 \$1.5 million of its own money if it expected nothing?
16 Because in the end, they had to spend -- in the end, they
17 committed to spend \$3 million here to be reimbursed a
18 million. \$500,000 of it was going to NASA.

19 Would they risk all of their good business
20 relationships that they had by promising all these
21 customers all over the world and distributors, we're
22 going to deliver space-age technology to you and it's
23 going to change -- it's going to change everything about
24 pressure sensor technology? Would they make those
25 promises to people if they didn't think NASA was going to

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1 actually deliver this stuff?

2 Would the State of Ohio have agreed to put a
3 million dollars of taxpayer money into an R&D project
4 that wasn't going to result in anything happening? I
5 told you that they made NASA tell them, yes, this is
6 real.

7 Would a tiny family business enter into a
8 patent license agreement agreeing to pay \$50,000 for
9 patent licenses that it couldn't do anything with?

10 Would they commit to paying \$5,000 a year
11 through 2025 for minimum royalties when they might not be
12 able to make any money at all? Or did they think that
13 NASA would ever take all this money and then terminate
14 the license agreement on the grounds that, well, Spectre
15 can't commercialize the technology?

16 THE COURT: Mm-hmm.

17 MR. WIGGIN: When the reason Spectre could not
18 -- and I would submit when we're talking about bad --
19 fair dealing and good faith, that the Courts do recognize
20 -- and this, again, is kind of a fuzzy sort of doctrine.
21 But if the Government does something to interfere with or
22 frustrate the other side's ability to perform the
23 contract and get the benefit of the contract, that is not
24 acting in good faith and that's not fair dealing. And
25 that's why I allege that wrongfully -- you know, they

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1 acted by the letter of the termination agreement in the
2 license agreement by terminating. But when they're the
3 ones who brought about the circumstances that allowed
4 them to exercise that right of termination, that is not
5 good faith and fair dealing.

6 The question that all of those -- the answer to
7 all of those questions is no. None of that would have
8 happened because Spectre wouldn't have done any of that.
9 The State of Ohio wouldn't have done -- wouldn't have
10 granted the money if they thought that none of this would
11 happen. And the Government would say, well, that's
12 stupid, that's their own problem, freedom of contract.
13 If they want to make a bad contract, you know, so be it.
14 That's -- none of this is really relevant.

15 And it is really relevant because if there's
16 any doubt in your mind about what any of these things
17 mean -- and in judging good faith and fair dealing,
18 you have to look at the intent of the parties and what
19 they -- what the basis of the bargain was and what they
20 expected to get and if there's any doubt or ambiguity as
21 to what any of these things mean, you can look at
22 extrinsic evidence and you can look at the context of the
23 deal, and there's no integration clause. This fancy
24 computer program that they have to (inaudible) this
25 boilerplate and it doesn't have an integration clause.

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1 THE COURT: Right.

2 MR. WIGGIN: So you're free to do all that.

3 Now, let me talk a little bit about the waiver
4 of express warranties.

5 THE COURT: Why don't we --

6 MR. WIGGIN: Take a break?

7 THE COURT: How long are you going to -- do you
8 anticipate being?

9 MR. WIGGIN: I better accelerate. I've said a
10 lot of stuff out of order, but I can try and focus on the
11 remainder of it.

12 THE COURT: What's your estimate of how --

13 MR. WIGGIN: Forty-five minutes maybe.

14 THE COURT: Forty-five minutes.

15 MR. WIGGIN: Of course she reserved all of her
16 -- a lot of time to respond to all of this.

17 THE COURT: Yeah, so -- well, if we're going to
18 go 45 minutes --

19 MR. WIGGIN: Maybe I can do it in less time
20 than that.

21 THE COURT: Let's go on for ten more minutes
22 and see.

23 MR. WIGGIN: Okay. Disclaimer of warranty.
24 Well, as you've heard from counsel, apparently, the
25 Government's interpretation is that we really haven't

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1 promised to do anything because the disclaimer of
2 warranty says that anything we provide or anything we
3 agree to do is taken as-is. And I'm not really sure what
4 that means when it applies to services. I'm not sure
5 what that means as applied to anything else.

6 I mean, I -- when I think of as-is, I think of
7 a used automobile. And the thing about taking a used
8 automobile as-is is you don't get a warranty.
9 Nobody's -- the seller shows up, he shows you the car.
10 You say, well, that's kind of rusty, the tires are kind
11 of bald, it's got a bunch of miles on it, you sure it
12 runs well? Oh, yeah, it runs like a dream. But it's as-
13 is. And if you decide to accept it, okay, this is
14 acceptable meaning you take it.

15 Now, we didn't have any opportunity to look at
16 anything. All we could rely on were the representations
17 that were made to us months and months before we signed
18 this contract.

19 THE COURT: Mm-hmm.

20 MR. WIGGIN: But this is NASA's boilerplate on
21 disclaimer wording.

22 THE COURT: Right.

23 MR. WIGGIN: This is something they put in
24 every single contract that disclaims everything about
25 everything they do. And, apparently, what I'm hearing

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1 from the Government is you had no right to expect
2 anything from us about anything. And that's why I made
3 up the blueberry muffins and singing the school fight
4 song. I forgot to put in my brief that the school fight
5 song was -- I was -- that was supposed to be a substitute
6 for the technology transfer. And the Government's
7 response is, well, we're not admitting that the fight
8 song is not transfer of technology, but even if it is,
9 you can't complain about it.

10 Now -- and Ms. Rose said, well, I guess the
11 duty of good faith and fair dealing would apply. But
12 we've also heard from them that that doesn't mean
13 anything because you can't -- the duty of good faith and
14 fair dealing, they tell you, cannot substitute for
15 anything that's in the contract. So if the contract says
16 there's no warranties and that, you know, you can't
17 expect that you're getting anything, then how can they
18 say, well, we've got to act in good faith and we won't
19 come over with a plate of blueberry muffins?

20 But what we intend to prove in this case is
21 that it might as well have been a plate of blueberry
22 muffins and the technology transfer might as well have
23 been the school fight song because neither one of them
24 did us any good and neither one of them accomplished any
25 of the benefit that was supposed to -- that the parties

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1 bargained for in this contract.

2 Okay. That's about the disclaimer of
3 warranties. I also wanted to say one other thing about
4 that. I hadn't really thought about this when the
5 Government came up with a motion because in all my years
6 of commercial litigation, I've seen -- anybody who's done
7 this has seen lots of cases where on the back side of a
8 contract, there is -- on the front side, there's all
9 sorts of promises made, all sorts of specifications, of
10 warranties, and on the back side, there's a boilerplate
11 disclaimer that says, we don't make any warranties.

12 THE COURT: Mm-hmm.

13 MR. WIGGIN: And it occurred -- I mean, I've
14 never been in a case where anybody really paid much
15 attention to that. So but I started thinking about the
16 nature of all these things a lot more when this came
17 along and it occurred to me that the purpose of these
18 disclaimers of warranties is actually to be used in a
19 contract where the seller has no intention of making any
20 warranties, where they really don't have an intention of
21 making any warranties and they don't make any warranties
22 or promises.

23 And the purpose of the disclaimer is not to
24 nullify promises that they make and representations that
25 they make and warranties that they make expressly; the

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1 purpose of the disclaimer is to make sure that some
2 lawyer doesn't show up down the road and say, well, other
3 language in the agreement -- I know that you didn't say
4 this, but other language in the agreement amounted to
5 that and these other oral statements that were made
6 amounted to that. That's the purpose of a disclaimer of
7 express warranties because, otherwise, what sense does it
8 make that you've got a disclaimer of express warranties
9 when everybody can read on the front side of the contract
10 that you make express warranties.

11 And that's why, as I say in the brief,
12 *generalia specialibus non derogant*, the general cannot
13 detract from the specific. So when NASA makes a bunch of
14 representations about how we will design 1000 PSI sensors
15 for you, we will do this, we will do this, we will do
16 that, they can't vitiate it with a boilerplate thing on
17 the back that says, well, we don't do any of that.

18 THE COURT: Okay.

19 MR. WIGGIN: Now, what about implied
20 warranties? It's kind of a weird thing to think that you
21 could have a disclaimer of implied warranties -- that you
22 could actually have implied warranties that survive a
23 disclaimer of implied warranties. But the more I think
24 about that, I think, why not? I mean, merchantability --
25 there are only two implied warranties. One is

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1 merchantability. NASA said, well, we're not merchants.
2 We put people on the moon. We don't sell -- we don't
3 design and sell stuff.

4 But, actually, the definition of a merchant
5 under the UCC, which they quote, by the way, even though
6 they say I'm somehow -- you know, it's wrong to quote the
7 UCC in this court because federal law applies. But the
8 definition of express warranty -- I mean, if a merchant
9 is a person who deals in goods of the kind or otherwise,
10 by his occupation, holds himself out as having knowledge
11 or skill peculiar to the practices or goods involved in
12 the transaction.

13 Dr. Okojie here had been working on these
14 things for over 20 years. He's got a Ph.D. I mean, he
15 speaks at international conferences, local conferences.
16 He's the Willy Wonka of silicon carbide. And if anybody
17 qualifies as a merchant under that definition, it's Dr.
18 Okojie, and by virtue of him, NASA does, too. And they
19 were acting as a merchant in this case. The whole
20 purpose of this contract was to commercialize this stuff.

21 THE COURT: Mm-hmm.

22 MR. WIGGIN: And so it should have been implied
23 by the circumstances, without the contract saying
24 anything, that there was a warranty of merchantability,
25 which means when you get this stuff from me, we know that

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1 you're going to sell it to somebody else and it's going
2 to work. It will be merchantable. Your seller isn't
3 going to sue you for fraud because the darn thing doesn't
4 work.

5 All right. That gets us to the -- the
6 limitation on damages. And as I -- what I have to
7 say about that is there is no -- NASA knows full well,
8 as you can tell from all these clauses, how to exclude
9 something if they want. I gave you Article 8. Article 8
10 is liability and risk of loss. And in there, Spectre
11 waived the right to make any claim in the future for
12 any injury or death that was caused to anybody. This was
13 all about personal injury or damage to property as a
14 result.

15 So this is a complete waiver of any claims.
16 You can't make a claim so you don't even have to talk
17 about damages. But it says you can't get damages either.
18 So they know how to do that. And my position is is that
19 there -- you will find nothing in this contract like
20 Article 8 which says that for business losses that arise
21 out of NASA's failure to perform this contract, that
22 Spectre waives all rights to make a claim and they can't
23 sue you. There's nothing that limitates -- that limits
24 them in the damages that we can sue for. And NASA knows
25 how to do that.

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1 And I will point to Article 18, which is the
2 right to terminate -- I've given you a copy. If you'll
3 look down in paragraph 3. NASA shall not be liable for
4 any costs, lost profits, revenue, direct or consequential
5 damages, or anything as a result of the termination by
6 NASA pursuant to paragraph 1 of this section. Now, that
7 doesn't apply -- that only applies when they terminate
8 the agreement, which they didn't do here. Why did they
9 have to put that in Article 18?

10 The reason they had to put it in Article 18 was
11 that there's nothing else in the contract that says you
12 can't sue us for lost profits, you can't sue us for
13 consequential damages. So they put it in here to make
14 sure that if NASA terminated the agreement, it could do
15 so without having any fear of being sued for lost profits
16 or consequential damages.

17 When I look back at Article 14, Disclaimer of
18 Warranties, which we were just talking about, and that
19 has in it the only other language in this contract that
20 you will find that bars my client from suing them for
21 consequential damages. And that's down at the very end.
22 We don't know what this means. It apparently applies to
23 everything, but the last sentence says, "Neither the
24 Government or its contractors shall be liable for
25 special, consequential or incidental damages attributed

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1 to such -- attributed to" -- forget that other
2 language -- "to services provided" -- (inaudible) -- "or
3 resulting products made or developed under as a result of
4 this agreement."

5 Now, why did they put this in here? They put
6 it in here because nowhere else in this contract except
7 for the termination clause will you find anything that
8 limits the right to sue for damages. So they put it in
9 here. And I maintain that this can apply only in the
10 case of damages arising from a breach of warranty, which
11 I argue this boilerplate does not preclude us from
12 making.

13 I think I've probably talked enough about good
14 faith and bad faith.

15 THE COURT: Mm-hmm.

16 MR. WIGGIN: Yeah, just one more word on the
17 essence of the bargain -- I guess I've talked about that.
18 I didn't mention, we -- the damages that we're seeking
19 here, \$45 million -- and I don't know if we can actually
20 prove to the Court that we're due that -- but I will tell
21 you that the way that we've arrived at that figure -- and
22 we will put on evidence to flesh it out, but the process
23 we used was that we took -- in the business plan that was
24 put together with NASA and approved by NASA that was
25 submitted to the State of Ohio -- we had to have a

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1 business plan -- and what it showed was that once this
2 got underway, we would ramp up before year five from \$18
3 million to \$25 million a year in sales.

4 THE COURT: Mm-hmm.

5 MR. WIGGIN: So what we did was -- I think that
6 maybe that -- that might have been a little aggressive.
7 I don't know. If NASA had delivered us something that
8 had worked and we could get it right out, maybe that
9 would have happened. But to be conservative, what we did
10 was we ramped it up and then we assumed no further
11 growth. We're going to expand the plant to get that
12 done; we're going to hire more people; we're going to pay
13 for more machines and materials. But after that point,
14 we're going to assume no further growth. We're not going
15 to keep that ramp going up.

16 So we assumed that through 2025, we would have
17 -- that's just the amount of gross we would have per year
18 for the rest of the years. And then we took the profit
19 margin we expected and we calculated that our profit
20 would be \$45 million. And based on those gross sales,
21 which would be a total of about \$250 million through
22 2025, NASA's cut would be \$15 million on their royalty.
23 So that's what they expected to get out of this, and I
24 think they really did expect it.

25 So I apologize for sort of going all over the

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1 place here, but I hope I -- I hope I've answered all your
2 questions and --

3 THE COURT: Yes.

4 MR. WIGGIN: -- if not, I'm certainly free to
5 answer them.

6 THE COURT: Okay.

7 MR. WIGGIN: I'll sit down now. Thank you.

8 THE COURT: Okay, thank you, Mr. Wiggin.

9 Ms. Rose, what do you anticipate in terms of
10 time?

11 MS. ROSE: I don't have much. I think I can
12 wrap up in less than five minutes.

13 THE COURT: Okay, good.

14 MS. ROSE: The reason I think I can be brief is
15 because I'm going to bring it back to the arguments that
16 are actually at issue and what the Court needs in order
17 to grant the Government's motion to dismiss.

18 At the beginning of Mr. Wiggin's presentation,
19 the Court asked is there any obligation of NASA to
20 perform without payment. There is not. The Plaintiffs
21 have acknowledged that they didn't make that payment that
22 was required prior to the work of Milestone 3. And
23 although they talked about what they would have liked
24 NASA to have delivered, there was no delivery required
25 under the contract until Milestone 6 for the sensors and

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1 Milestone 5 for certain information.

2 The milestones are clearly outlined in Exhibit
3 2. The -- in Article 3B, the number of paragraphs track
4 the milestone schedule and then Article 4 has the
5 milestone schedule itself.

6 In addition, what we haven't heard is anything
7 that would demonstrate that the disclaimer of liability
8 and damages here didn't apply. I think Plaintiff's
9 primary argument is that this was boilerplate, but simply
10 by labeling something "boilerplate" doesn't eliminate an
11 enforceable contract provision.

12 The -- oh, one more thing I wanted to know on
13 NASA's performance. If they weren't being paid, there
14 was a limit on what they could do and this is outlined in
15 Exhibit 2 under Article 5 in paragraph 5 that talks about
16 NASA's inability to expend funds if it's going to run
17 into an Anti-Deficiency Act problem. So to the extent
18 that Spectre isn't paying, NASA can't spend that money
19 itself because it would be in violation of the Anti-
20 Deficiency Act.

21 THE COURT: Mm-hmm.

22 MS. ROSE: One thing that Plaintiff appeared to
23 be confused about was the Government's discussion of when
24 -- when the disclaimers of liability and damages wouldn't
25 apply and my earlier reference to bad faith. That was

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1 not a reference to the -- to the duty of good faith and
2 fair dealing. We recognize the distinction. And I think
3 that Plaintiff acknowledged in their presentation that
4 they're not actually alleging bad faith, and we think
5 that's consistent with their complaint.

6 The one thing that I would say about the duty
7 of good faith and fair dealing is that it cannot, of
8 course, expand the parties' contractual duties or create
9 duties inconsistent with the contract provisions, and
10 that includes altering the contract's discernable
11 allocation of risks. And this was a contract where there
12 was a very clear allocation of risk and the allocation
13 was to put the risk on Spectre.

14 And if the Court does not have any further
15 questions, then we will rest on our briefs.

16 THE COURT: Okay. Thank you very much, Ms.
17 Rose and Mr. Wiggin.

18 MR. WIGGIN: Well, if you'd like, just another
19 two minutes --

20 THE COURT: No, I --

21 MR. WIGGIN: You wouldn't? Okay.

22 THE COURT: I think I've heard a lot of useful
23 information. At least I'll give you the way I am leaning
24 at the moment, which may help counsel in terms of
25 settlement. I think this is a complex relationship that

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1 requires an answer to some fact questions about the whole
2 transaction on which good faith hinges. I mean, both
3 counsel agree that if NASA had not really performed over
4 the blueberry muffins example, then that would be a good
5 faith violation. Every contract has to have some
6 meaning, otherwise, it's not a real contract, with some
7 obligations it imposes. That's the nature of the
8 contract relationship.

9 And if that's the case, as we -- I'm thinking
10 I'm going to look more at the materials and analyze in
11 greater detail what I've heard today. It seems that a
12 trial would be necessary and I have to -- I would have
13 to, in that case, deny the Government's motion to
14 dismiss.

15 And the facts that I've also heard and seen in
16 -- through the briefs -- I've read through the briefs --
17 it's a complex transaction that was clearly going to be
18 added for reasons that were not completely clear. Some
19 may have related to NASA, some may have related to the
20 expectations of dealing with the Government. Small
21 businesses often don't realize the complexities that
22 exist. And this one is like complexity raised to another
23 order of magnitude because of the involvement of a state
24 entity as well as a federal entity. And so all of that
25 creates a complex business relationship, that if the

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1 Court is going to obviously do justice in the case and
2 follow what the law requires, has to be understood. And
3 to the extent good faith seems to be an integral part of
4 the dispute, that has to be -- that's a fact question
5 that requires witnesses.

6 I'd add one thing, also, which may help in
7 terms of an attempt to settle this case. When we have
8 relationship cases as opposed to clear legal principle
9 cases, settlement is always a better option. It seems to
10 me that the \$45 million claim isn't anywhere near likely
11 to succeed simply because it's speculative. The rule has
12 generally been when you're looking at business lost
13 profits, these have to be existent profits. They have to
14 have had a track record. New profits are virtually
15 never, that I can remember, granted, future expected
16 profits for a new venture.

17 So with that in mind, that may give some kind
18 of guidance to the value in the case. But I would
19 definitely like to see discussions about settlement. And
20 then I'll probably be able to get a ruling out in the
21 next week on the motion, whether I will or will not
22 dismiss it. But in the meantime, given my discussion,
23 I'd like to schedule a telephone conference where the two
24 of you can -- the two sides can discuss this together. I
25 know, obviously, you have to discuss it with other people

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1 who are not in the courtroom first and so I don't know
2 what a reasonable -- do we have a calendar?

3 MR. WIGGIN: Judge --

4 THE COURT: Okay, thank you.

5 MR. WIGGIN: -- I should say that I did bring
6 this up from the beginning, and when I first talked to
7 Mr. Gwynne, he was not up to speed and he had to talk
8 with lots of people in NASA and I understand how
9 difficult that must be for the Justice Department. And,
10 of course, by the time he got up to speed, he filed the
11 motion. And then he left, and I talked to Ms. Rose about
12 it. But I do agree that -- and I've said all along --
13 that we would like to sit down and try to work things
14 out.

15 THE COURT: Would a reasonable date for our
16 status conference be the 27th of July? Because that
17 would give you -- both sides a chance to discuss this
18 internally and then have a status conference at least to
19 -- I don't expect anything to be done by the status
20 conference, but I would like to at least get a
21 temperature reading. I don't have the sensors for that,
22 but I --

23 MS. ROSE: Your Honor, I will be out for the
24 next two weeks, so there won't any initiation on that for
25 the Government until July 10th.

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1 THE COURT: The 27th would be --

2 MS. ROSE: It would be --

3 THE COURT: -- feasible?

4 MS. ROSE: It would be okay, but I'll only have
5 a few weeks before that. So (inaudible) on what we would
6 be able to accomplish.

7 THE COURT: Okay. Why don't we just then
8 see when we're able to get it together. I think we
9 should have a target date that's within reason. So let's
10 say the 27th will be a status conference on the
11 telephone. Let's see when we -- we can put it at 2:00
12 and then move (inaudible) to 2:30. And at that point,
13 as I said, if I had a high pressure sensor, I would use
14 it to determine the pressure and the temperature.
15 But subjectively I would get a sense from each of you
16 as to what the likelihood of proceeding would be, and in
17 the meantime, think, you know, what a -- if settlement is
18 not in the cards, at least start thinking about a trial
19 date.

20 So I'll see you all or talk to you all on the
21 27th at 2:00. And we'll consider the Government's motion
22 and take that under advisement for now and we'll give you
23 a short -- in a short time, the decision. Thank you both
24 for your very useful -- both your oral arguments and your
25 briefs to the Court in this case, and I look forward to

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1 talking to you again.

2 MR. WIGGIN: Thank you, Your Honor.

3 (Whereupon, at 4:16 p.m., the hearing was
4 adjourned.)

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1 CERTIFICATE OF TRANSCRIBER

2

3 I, Elizabeth M. Farrell, court-approved
4 transcriber, certify that the foregoing is a correct
5 transcript from the official electronic sound recording
6 of the proceedings in the above-titled matter.

7

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10 DATE: 1/17/2018

S/Elizabeth M. Farrell

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ELIZABETH M. FARRELL, CERT

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